No. 02-1445

Supreme Court, U.S.
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In The
# Supreme Court of the United States

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE and DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

*Cross-Petitioners,*

v.

FRED RIGGS, DONNA SINGER, and AL DICKSON,

*Cross-Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR CERTIORARI OF SAN JUAN HEALTH SERVICES DISTRICT, ROGER ATCITTY, KAREN ADAMS, PATSY SHUMWAY, JOHN LEWIS, REID WOOD AND LAUREN SCHAFER

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## STATEMENT OF THE CASE

Cross-respondents' "Statement" and "Restatement of the Case" in the brief in opposition contain numerous factual assertions and arguments that are either not properly cited to, or not supported by, the record.[1] In addition, in connection with their factual assertions, cross-respondents frequently state that the cross-petitioners do not "dispute" the assertions made. While cross-petitioners in fact dispute most of cross-respondents' factual assertions, cross-petitioners will not burden the Court with a specific response to each factual assertion because cross-respondents' arguments are simply irrelevant to the legal issue raised by the conditional cross-petition: whether the court of appeals erred in reversing the district court's dismissal of the claims against cross-petitioners and holding that the Navajo tribal court's subject matter

[1] For example, cross-respondents assert that numerous Native Americans were improperly billed by the San Juan Health Services District for health care services received at either the Montezuma Creek clinic or various off-reservation Health District facilities. (Cross-petitioners in fact dispute that Native Americans entitled to medical care from Indian Health Services ("IHS") received Health District bills for services at on-reservation facilities.) For the proposition that any bills were improper, cross-respondents cite only statutory language which provides that where contract health services are "authorized" by the appropriate arm of IHS, an IHS patient has no liability for payment. This statutory language falls far short of establishing that the Health District improperly billed Native Americans for health care. As cross-respondents' own citation establishes, contract health services must be authorized before the recipient is relieved of the obligation to pay. Thus, the mere fact that Native Americans received bills does not establish that such bills were improper.

jurisdiction must be addressed prior to the issue of cross-petitioners' sovereign immunity from suit in tribal court.

## REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

### I. WHETHER THE HEALTH DISTRICT AND SAN JUAN COUNTY CROSS-PETITIONERS ENJOY IMMUNITY FROM SUIT IN TRIBAL COURT WAS NOT DECIDED BY THE COURT OF APPEALS

In opposition to the cross-petition, cross-respondents first argue that the court of appeals has already determined that cross-petitioners do not have sovereign immunity from suit in tribal court. This assertion is incorrect. Cross-respondents rely on a statement from the court of appeals' opinion which rejected one of a number of arguments made by San Juan County cross-petitioners in support of the proposition that the San Juan County defendants had sovereign immunity from suit in tribal court. However, the court of appeals specifically reserved judgment on whether cross-petitioners enjoy sovereign immunity from suit in tribal court, holding only that the issue of subject matter jurisdiction should precede any sovereign immunity analysis. *MacArthur v. San Juan County*, 309 F.3d 1216, 1226 (10th Cir. 2002); P. App. at 22a. For the reasons stated in cross-petitioners' opening brief, the court of appeals' ruling was in error.

## II. THE SOVEREIGN IMMUNITY ISSUE IS NOT MOOT UNDER *COOK COUNTY V. U.S. EX REL. CHANDLER*

Cross-respondents next argue that the conditional cross-petition should be denied because of this Court's opinion in *Cook County v. United States ex rel. Chandler*, 123 S.Ct. 1239 (2003). The issues raised in *Cook County* are not relevant to the sovereign immunity defense raised by defendants. *Cook County* addressed whether counties are "persons" subject to suit under the False Claims Act following amendment of the Act to raise the ceiling on damages recoverable from double damages to treble damages, and concluded that counties continue to be subject to suit under that Act. *Id.* at 1249. *Cook County* did not in any way address a county's immunity from suit in a tribal court.

Cross-respondents also cite to *Jinks v. Richland County*, 123 S.Ct. 1667 (2003), for the proposition that a state's authority to immunize its political subdivisions must yield to Congressional enactments. As an initial matter, *Jinks* did not in any way deal with the immunity of a state and its political subdivisions from suit in tribal court. Rather, *Jinks* addressed the validity of 28 U.S.C. § 1367(d), which requires state courts to toll the state statute of limitations on a supplemental jurisdiction claim while the claim is pending in federal court and for a period of thirty days thereafter. In *Jinks*, this Court held that states may not avoid the tolling effect of section 1367(d) through an assertion of state sovereign immunity. In addition, cross-respondents rely on *Jinks* for the proposition that Congress can overcome a state's sovereign immunity, pointing to various Congressional enactments that cross-respondents assert demonstrate Congressional

intent in favor of tribal court jurisdiction. However, as set forth in cross-petitioners' brief in opposition in related case no. 02-1253, cross-respondents' arguments that Congress has authorized tribal courts to exert jurisdiction against non-Indians, and states and their political subdivisions in particular, for any event occurring on a reservation is without merit. Brief in opposition, no. 02-1253 at 13-17.

Cross-respondents also argue that in *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court said that notions of qualified and absolute immunity should not be analyzed at the jurisdiction stage. However, as explained in the cross-petition, sovereign immunity is distinct from the doctrines of qualified and absolute immunity and should therefore be addressed prior to or concurrently with the issue of tribal court subject matter jurisdiction. Cross-Petition at 9-14.

## III. CROSS-PETITIONERS HAVE NOT WAIVED THEIR SOVEREIGN IMMUNITY FROM SUIT IN TRIBAL COURT

Cross-respondents next argue that by filing counterclaims and participating in the tribal court proceedings, cross-petitioners have waived the right to assert sovereign immunity from suit in tribal court. In fact, as the Tenth Circuit explained in *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997), a state does not waive its Eleventh Amendment immunity by filing a counterclaim, as the courts apply "a 'stringent test' to determine if such a waiver has occurred." *Id.* at 1385 n.4; *see also Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (holding that Eleventh Amendment immunity is waived "only where stated by the most express language or by such overwhelming implication from the text of a

state statute or constitution as will leave no room for any other reasonable construction" (citation and internal quotation marks omitted)). As the *Mescalero* court found, the fact that New Mexico filed a counterclaim against the plaintiff tribe could not be interpreted as a waiver of immunity because filing a counterclaim is "hardly consistent with the kind of unequivocal waiver necessary to waive that immunity." *Mescalero*, 131 F.3d at 1385 n.4.

Here, while cross-petitioners asserted a counterclaim in tribal court, cross-petitioners simultaneously asserted that they were immune from suit in the tribal court. Therefore, their assertion of a counterclaim did not operate as a waiver of their immunity from suit. Moreover, as this Court noted in *Hicks*, if an immunity defense pertains to jurisdiction, as cross-petitioners' sovereign immunity defense does in this case, *see* Cross-Petition at 11-12, the defense is non-waivable. *Hicks*, 533 U.S. at 373.[2]

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[2] In their brief in opposition at 25-38, cross-respondents make numerous meritless assertions about improprieties regarding cross-petitioners' choice of representation. Cross-petitioners will not address the merits of cross-respondents' assertions as they are irrelevant to the issues before the Court. Cross-petitioners note, however, that cross-respondents previously sought to disqualify counsel for cross-petitioners before the federal district court based on these arguments, and their motion was denied.

## CONCLUSION

For the reasons stated above and in the cross-petition, in the event cross-respondents' petition in case no. 02-1253 is granted, the cross-petition should also be granted.

Respectfully submitted,

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